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Supreme Court, U.S.
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No. 88-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

TELUM, INC., EARL K. COOK AND CARL R. KING,
Petitioners,

v.

E. F. HUTTON CREDIT CORP.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF PARTIES

Respondent Chrysler Capital Corporation is a wholly-owned subsidiary of Chrysler Financial Corporation which, in turn, is a wholly-owned subsidiary of Chrysler Corporation. At the time of the transaction at issue in this case, the name of the company was International Paper Credit Corporation, and the company was a wholly-owned subsidiary of International Paper Corporation. Prior to the lawsuit, the stock of respondent was acquired by the E.F. Hutton Group and the name was changed to E.F. Hutton Credit Corporation. In 1985, respondent was acquired by Chrysler Financial Corporation and the name was changed to Chrysler Capital Corporation. For sake of convenience and consistency with the proceedings below, respondent will be referred to herein as "Hutton."

Respondent has no subsidiaries other than wholly-owned subsidiaries. Its affiliated companies are too numerous to list here and are therefore listed in Appendix G.

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Respondent, Chrysler Capital Corporation, formerly known as E.F. Hutton Credit Corporation ("Hutton"), respectfully requests that this Court deny the Petition for Writ of Certiorari by which the petitioners, Telum, Inc. ("Telum"), Earl K. Cook and Carl R. King, seek review of the decision of the United States Court of Appeals for the Tenth Circuit. That decision is reported at 859 F.2d 835.

STATEMENT OF THE CASE

Hutton was a Delaware corporation engaged in the business of equipment financing. Telum, a Nebraska corporation with its principal place of business in Utah, was in the business of operating truck stops in the mid-western and western United States. The parties entered into an agreement in Utah whereby Hutton purchased from J.P. Exploration, Inc., an oil rig which was then leased to Telum. Telum's primary motivation for entering into the transaction was to obtain a tax shelter for a portion of its income. Telum took an investment tax credit and subleased the rig to J.P. Exploration. J.P. Exploration was responsible for assembling and operating the rig in Oklahoma. 859 F.2d at 836. Possession of the rig never changed hands and neither Telum nor Hutton inspected the rig prior to closing in July, 1980.

In the lease agreement between the parties, Telum waived "all right to trial by jury in any litigation arising herefrom or in relation hereto." *Id.* at 837. Similarly, petitioners Cook and King, as guarantors, waived "trial by jury in any action or proceeding arising out of, under, or by reason of [the] guaranty or any other dispute between Guarantor and [Hutton]." Record, Exhibits 9 and 10.

For approximately two years, Telum and J.P. Exploration made their respective lease and sublease payments. In the summer of 1982, however, the oil drilling market was in a deep decline and J.P. Exploration was sold to a third party who discontinued the sublease payments. Telum attempted to repossess the rig. Telum claims that thereafter, in January 1983, it discovered for the first time that the rig was not

complete as described in the lease schedule at the time of the closing. *Id.* at 836.

Telum brought this diversity action in the District of Utah seeking rescission of the lease and restitution of the money it had paid to Hutton. Telum contended that Hutton made a number of misrepresentations which wrongfully induced Telum to enter into the lease. It also sought rescission on other theories, including breach of contract and failure of consideration. Telum did not request a jury trial at that time. Hutton counterclaimed to enforce the lease and guaranties. In its reply, Telum demanded a jury trial. *Id.* at 836-37.

In connection with motions for summary judgment, Hutton requested a ruling that petitioners were not entitled to a jury trial because of the jury waiver agreement. App. A at 2a. The trial court denied the request without an evidentiary hearing and Hutton moved for reconsideration, again arguing as a matter of federal law that mere allegations of fraud in the inducement of the lease were not sufficient to deny Hutton the benefit of the jury waiver agreement where there was no claim that the jury waiver itself was induced by fraud. App. B at 4a-8a. The district court denied the motion without an evidentiary hearing or findings, apparently concluding "that Telum's allegations of fraud in the inducement relating to the contract as a whole were sufficient to vitiate the [jury waiver] provision."[1] 859 F.2d at 837; App. C at 9a.

Approximately five months later, the matter proceeded to trial before a jury. The trial court did not conduct a pre-trial hearing, as the Petition implies, in which Telum put on its proof of fraud before the court, sitting without a jury, nor did the trial court find that there was "sufficient evidence of fraud to permit the court provisionally to set aside the jury waiver provision pursuant to state law . . . ." Petition for Certiorari, at 3-4. Rather, the record reflects that the motion to reconsider had been denied five months earlier without an evidentiary hearing or findings, and the district court never

[1] In subsequent pre-trial arguments on various procedural matters, Hutton continued to take the position that Telum was not entitled to a jury trial, but the court never again entertained the issue.

again considered Telum's entitlement to a jury trial. The hearing apparently referred to in the Petition resulted from a motion *in limine* filed by Hutton requesting the trial court to determine, outside the presence of the jury, whether petitioners could present a *prima facie* case of fraud before allowing the jury to hear evidence of fraud under an exception to the parol evidence rule. [2] App. D at 11a. The evidentiary hearing was held after the jury trial had begun and after some testimony had been heard by the jury. The issue of whether the case would be tried to a judge or a jury had been long since decided and was not before the court at that time.

On appeal, a unanimous panel of the United States Court of Appeals for the Tenth Circuit held that the trial court erred in its pre-trial ruling that general allegations of fraud were sufficient to invalidate a jury waiver provision and also held that petitioners were not entitled to a jury trial as a matter of federal law in the absence of a claim that the jury waiver provision itself was induced by fraud. 859 F.2d at 838. In addition, the court of appeals reversed the trial court's ruling excluding certain evidence of a joint venture between Telum and a principal of J.P. Exploration. *Id.* at 838-839. The case was remanded for a new trial. Telum's petition for rehearing and suggestion for rehearing *en banc* were both denied. Petition for Certiorari at 11a.

REASONS FOR DENYING THE PETITION

This case does not present the substantial *Erie* issues that petitioners suggest, nor does it offer an appropriate opportunity for the Court to provide further guidance regarding the proper application of the Rules of Decision Act, 28 U.S.C. § 1652. In order to make this case appear to present an issue under the Rules of Decision Act, the Petition contrives a rule of state law which supposedly conflicts with the holding of the court of appeals. Petitioners argue that the law of both

[2] The hearing is reported as part of the trial transcript at Vol. I, pp. 71-198. Due to its length, the partial transcript is not reproduced as part of the Appendix. Petitioners' characterization of the hearing is markedly different from that contained in their brief on appeal to the Tenth Circuit. App. F at 23a.

Utah and New York "clearly" provides that fraud in the inducement of a contract nullifies a jury waiver provision contained therein. However, the state cases cited by petitioners do not establish such a rule nor do they articulate a procedure for a trial court to follow in determining whether to enforce a jury waiver provision in the face of mere allegations of fraud.

In this case, the Tenth Circuit held that the trial court erred in ruling that general allegations of fraud were sufficient to invalidate a jury waiver agreement. Petitioners ignore this portion of the holding below. Instead, the Petition incorrectly states that the trial court conducted a pre-trial evidentiary hearing at which it held that there was sufficient proof of fraud to "provisionally" set aside the jury waiver agreement.

Given this background, there are several reasons why this Court should decline review. First, there is no conflict between state and federal law requiring the application of the Rules of Decision Act. Petitioners have merely contrived a rule of state law and have mischaracterized the record in order to make that rule appear to apply in this case. Second, the "confusion" among the circuits posited by petitioners is illusory. Third, the ruling of the Tenth Circuit is not in conflict with decisions of this Court. Finally, petitioners did not raise the issue set forth in the Petition in a timely fashion below and should be precluded from raising it here.

1. Review is Not Appropriate Because Petitioners Have Invented a Rule of State Law and Have Mischaracterized the Record in Order to Suggest a Conflict Between State and Federal Law.

a. The Cited Utah and New York Cases Do Not Support Petitioners' Position.

Petitioners argue that it is "settled" under the laws of Utah and New York[3] that a jury waiver provision contained

[3] Petitioners' apparent assertion that the choice of law provision in the lease agreement compels the application of New York law is inconsistent with their principal argument that fraud vitiates the entire agreement, including the jury waiver provision.

in a fraudulently induced contract is not binding on the defrauded party. Petition for Certiorari at 3. Indeed, the entire Petition is premised on the unwarranted assertion that state law clearly would have afforded petitioners a jury trial in this case. Contrary to petitioners' contention, no rule of state law on this issue has been authoritatively declared either by legislative enactment or by a ruling of the highest courts of Utah or New York. The state cases cited in the Petition are silent on the question of whether a judge or jury should be the trier of fact in a dispute over the enforceability of a contract containing a jury waiver provision.

The Utah cases cited by petitioners do not mention either jury waiver provisions or the effect of allegations of fraud on their enforceability. *Frailey v. McGarry*, 116 Utah 504, 211 P.2d 840 (1949), held that a party to a contract who believes he has grounds for rescission must act promptly or he waives the right to rescind. *Ogden Valley Trout & Resort Co. v. Lewis*, 41 Utah 183, 125 P. 687 (1912), was concerned with the grounds upon which a party may seek rescission of a contract and, independent of the rescission issue, the ability of a trial judge to impanel an advisory jury on its own motion, against the wishes of both parties.[4]

Likewise, the New York cases cited in the Petition have nothing to do with the enforceability of jury waiver provisions. In *President and Directors of Manhattan Co. v. Monogram Associates, Inc.*, 276 A.D. 766, 92 N.Y.S.2d 579 (N.Y. App. Div. 1949), an intermediate appellate court held, for obvious reasons, that a contractual provision waiving the defense of fraud is not enforceable. The other New York cases, *Seneca Wire & Mfg. Co. v. A.B. Leach & Co.*, 247 N.Y. 1, 159 N.E. 700 (1928), and *Kountze v. Kennedy*, 147 N.Y. 124, 41 N.E. 414 (1895), were concerned merely with articu-

[4] In the present case, the trial court did not treat the jury as an advisory jury. The court entered judgment directly on the jury verdict. 859 F.2d at 837.

lating the grounds under New York law for rescission of a contract based on fraud.[5]

None of the cases cited in the Petition holds that mere allegations of fraud are sufficient to vitiate a jury waiver provision. Nor do those cases suggest a procedural rule for dealing with the issue faced by the trial court in this case when confronted with the question of whether to allow a jury trial. Since the trial judge below did not hold an evidentiary hearing on this issue or make findings of any kind, the only basis in the record for the refusal to strike the jury demand is the general allegation of fraud contained in the defense to the counterclaim. 859 F.2d at 837.

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[5] Petitioners have not cited two intermediate appellate court decisions from New York requiring a separate preliminary jury trial on the issue of fraud raised as a defense in a legal action to enforce a contract containing a jury waiver. *Federal Housecraft, Inc. v. Faria*, 28 Misc. 2d 155, 216 N.Y.S.2d 113 (N.Y. App. Term 1961); *Bank of New York v. Cheng Yu Corp.*, 67 A.D.2d 961, 413 N.Y.S.2d 471 (N.Y. App. Div. 1979). The court in *Faria* recognized that it was departing from its own precedent, having previously held that jury waiver agreements are enforceable in the face of general allegations of fraud in the inducement. *Federal Housecraft, Inc. v. Faria*, 216 N.Y.S.2d at 114. The New York Court of Appeals has never recognized either the rule adopted in *Faria* or the reasoning behind it.

Moreover, the *Faria* rule specifically applies only in purely legal actions where fraud is asserted as a defense. This is an important distinction because under New York law, unlike federal law, if a complaint states both legal and equitable causes of action, the plaintiff waives the right to a jury trial on the legal causes of action. *DiMenna v. Cooper & Evans Co.*, 220 N.Y. 391, 115 N.E. 993 (1917); *Leav v. Weitzner*, 268 A.D. 466, 51 N.Y.S.2d 775 (N.Y. App. Div. 1944); *Epstein v. Paganne Ltd.*, 39 A.D.2d 855, 333 N.Y.S.2d 187 (N.Y. App. Div. 1972). Whether a counterclaim defendant in an equitable action retains the right to a separate jury trial on the counterclaim may depend on whether the counterclaim and the defenses to it represent an entirely separate dispute. *DiMenna v. Cooper & Evans Co.*, 115 N.E. at 994-95. In this case, where the complaint seeks purely equitable relief and the compulsory counterclaim, together with the defenses thereto, presents in mirror image the same issues raised by the complaint and answer, it is likely that there would be no right to a jury trial under New York law.

Utah law on the right to a jury trial is considerably less developed, but it is questionable whether Telum would have been entitled to a jury trial under Utah law even in the absence of the jury waiver. Since the case was initially brought as an equitable action and raised predominantly equitable issues, Telum arguably would have had no right to a jury trial in a Utah court. *Coleman v. Dillman*, 624 P.2d 713 (Utah 1981).

b. This Case Does Not Afford the Court an Opportunity to Address the Rules of Decision Act Because There is No Clear Conflict Between State and Federal Law.

Even if petitioners have identified an unresolved issue under the Rules of Decision Act, the absence of authoritatively declared state law in direct collision with federal law makes this case an inappropriate vehicle for consideration of that issue.[6] Assuming *arguendo* that the question should have been decided as a matter of state contract law, the lack of any statement by the highest courts of either Utah or New York as to the nature of that law leaves it to speculation that their rulings would be different from that of the Tenth Circuit.[7] If this Court is inclined to review the question of whether the Rules of Decision Act requires the application of state contract law to determine the effect of contractual provisions dealing solely with procedure, it should await a case where state law readily can be determined and where there is a direct conflict with the federal procedural law at issue. This is not such a case.

Absent a clear state rule, it would be difficult, if not impossible, for the Court to apply the tests it previously has articulated for determining what law governs under the Rules of Decision Act. For example, a balancing of state and federal interests as described in *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), would be problematic when there

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[6] Petitioners argue that the Court should grant certiorari in this case in order to review the question orginally posed but not reached in *Stewart Organization, Inc. v. Ricoh Corp., 108 S. Ct. 2239, 101 L.Ed.2d 22 (1988). Petition for Certiorari at 10. This case differs markedly from Stewart Organization* because, in the latter, the Supreme Court of Alabama had clearly articulated a state rule that directly conflicted with the federal law applied by the court of appeals.

[7] It is entirely possible that Utah or New York courts would adopt the same rule applied by the Tenth Circuit, rather than that asserted by petitioners. If petitioners' position were the law, jury waiver clauses would be virtually unenforceable in any case where one party merely alleged that the underlying contract was fraudulently induced. If the party claiming fraud failed in his proof of fraud, the benefit of the jury waiver agreement would be irretrievably lost to the other party to the contract.

is no clearly articulated state law to suggest the scope of those interests or to indicate whether they are in conflict with federal policies. Similarly, the "modified outcome determination" test of *Hanna v. Plumer*, 380 U.S. 460 (1965), would be difficult to apply in this case because, in the absence of conflicting state law, it is impossible to determine whether the outcome would be different in state court.

Furthermore, the circumstances of this case do not raise *Hanna's* fairness concerns relating to the so-called "twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468. Since petitioners, as plaintiffs, selected the federal forum themselves, they can hardly complain that they have been the victims of discrimination.

c. Petitioners Have Mischaracterized the Record.

Petitioners apparently concede that mere allegations of fraud are not sufficient to invalidate a jury waiver provision. In order to avoid the consequences of that concession, however, the Petition asserts that a "provisional" finding of fraud, rather than simple allegations of fraud, formed the basis for the district court's ruling. The Petition states that the trial judge "faced a preliminary procedural problem" at the beginning of the trial concerning whether a jury trial should be permitted. Petition for Certiorari at 3. Without citation to the record, petitioners assert:

> If there was no fraud in the inducement of the lease agreement, then under the terms of the contract, petitioners were not entitled to a jury on any issues. . . . To avoid permitting petitioners to defeat the jury waiver provision by a simple allegation of fraud, the district court required petitioners to put on the record their proof of fraud before the court, sitting without a jury. After this preliminary offer of proof, the district court held that there was sufficient evidence of fraud to permit the court provisionally to set aside the jury waiver provision pursuant to state law and allow the jury to determine if there had been a fraud committed.

Id. at 3-4. This claim that the trial judge addressed the problem by reviewing the evidence and "provisionally" setting aside the jury waiver under state law is little more than an exercise in revisionist history. The hearing apparently referred to by petitioners occurred during the trial and had absolutely nothing to do with the jury waiver issue. The jury waiver question had been decided five months earlier on Hutton's motion for reconsideration and was never again considered by the district court.

2. There is No Conflict or Confusion Among the Circuit Courts of Appeals.

Petitioners suggest that this case provides the Court with an opportunity to "resolve the uncertainty that has existed for over two decades among the courts of appeals over the extent to which the Rules of Decision Act reaches jury trial issues in diversity cases." Petition for Certiorari at (i). Petitioners attempt to create the impression that a "tension" exists between the holdings of this Court in *Hanna* and *Byrd,* and that this "tension" has left the lower courts in a state of confusion. Although some commentators have argued that the approaches taken by the Court in these cases are inconsistent, *see, e.g.,* Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma,* 91 Harv. L. Rev. 356 (1977), a review of the circuit decisions cited by petitioners indicates that the "uncertainty" or "tension" is exaggerated.

With the exception of the issue specifically resolved by this Court last term in *Stewart Organization, Inc. v. Ricoh Corp.,* 108 S. Ct. 2239, 101 L.Ed.2d 22 (1988), petitioners have failed to identify a single instance in which the circuits have disagreed over the application of *Erie* Principles to jury trial or other procedural issues. Notwithstanding any theoretical "uncertainty," the cases cited by petitioners do not demonstrate that the courts have experienced any difficulty in harmonizing or applying the principles embodied in *Hanna* and *Byrd.*

The Tenth Circuit's ruling in this case is the only decision by a federal court concerning the effect of allegations of fraud on a contractual waiver of the right to a jury trial. Since

there is no conflict or confusion in the circuits on this issue, this Court's review is not warranted.

3. The Holding of the Tenth Circuit Does Not Conflict with Prior Decisions of this Court.

In *Simler v. Conner*, 372 U.S. 221 (1963), this Court held that the right to a jury trial in a federal diversity action is to be determined as a matter of federal law, stating: "Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved." *Id.* at 222. An essential characteristic of the independent federal system for administering justice is the manner in which it "distributes trial functions between judge and jury . . . under the influence—if not the command—of the Seventh Amendment." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. at 537.

Petitioners' attempt to characterize the issue as a substantive question of contract interpretation does not change its essential nature. This case deals with the "narrow confines of the judge-jury relationship" and the procedural question of whether mere allegations of fraud are sufficient to vitiate a jury waiver agreement. Regardless of whether *Byrd* created an "enclave of federal common law," the holding in *Byrd* is rooted in the Seventh Amendment and is consistent with the way in which federal trial judges have apportioned power between judge and jury in the absence of congressional legislation. *See* Bourne, *Federal Common Law and the Erie-Byrd Rule*, 12 Balt. L. Rev. 426, 471 (1983) (discussing *Byrd's* contribution to the *Erie* rule). Despite petitioners' assertion that there are conflicts between *Byrd* and *Hanna*, the holdings of *Byrd* and the Tenth Circuit in this case, insofar as they apply federal law in allocating the decision-making function between judge and jury, are not inconsistent with either the ruling or the dictum of *Hanna*.[8]

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[8] *Hanna* dealt with the applicability of one of the Federal Rules of Civil Procedure and the Rules Enabling Act, 28 U.S.C. § 2072, rather than the Rules of Decision Act.

The effect of the Tenth Circuit's holding is to designate a procedural mechanism for adjudiciating state-created rights, including rescission of fraudulently induced contracts. Under that ruling, a party would be entitled to a bifurcated jury trial if he alleged that the jury waiver agreement itself was induced by fraud. The outcome would determine whether a jury trial would be available on the claim of fraudulent inducement of the underlying contract.

4. Petitioners Did Not Raise this Issue in a Timely Manner Below.

In its original brief on appeal to the Tenth Circuit, Hutton argued this issue exclusively as a matter of federal law. App. E at 15a-18a. Although petitioners did include citations to two New York state court decisions in their brief on appeal, they did not argue that the issue was governed by state rather than federal law. Instead, petitioners based their argument primarily on the Seventh Amendment and federal court decisions under Rule 38 of the Federal Rules of Civil Procedure. App. F at 21a-23a. Petitioners are critical of the court of appeals for simply relying on *Simler v. Conner* and not discussing the choice of law question at length. Such criticism is unwarranted since petitioners never presented this argument to the court of appeals for its consideration.

After the Tenth Circuit had announced its decision, petitioners requested reconsideration *en banc*, raising the state law argument for the first time and contending that *Stewart Organization, Inc. v. Ricoh Corp., supra*, somehow required reconsideration of the jury trial issue. *Stewart Organization* does not, however, represent a substantial change in the law and, as the Tenth Circuit obviously recognized, did not compel reconsideration of an issue not raised in the original briefs filed by the parties.

Failure to properly raise an issue before the court of appeals is sufficient reason for this Court to refuse to consider the issue. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). Merely raising an argument for the first time by way of an unsuccessful petition for rehearing does not constitute

properly raising the issue below. *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958). Since there are no extraordinary circumstances excusing petitioners' failure to timely raise the issue below, this Court should not grant certiorari.

CONCLUSION

Even if the Court were inclined to re-enter the *Erie* arena and provide additional guidance on the application of the Rules of Decision Act, this case presents a poor vehicle to achieve that aim. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

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IN THE

United States District Court

DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * * *

TELUM, INC., a Nebraska corporation,
Plaintiff,
vs.
E. F. HUTTON CREDIT CORPORATION, a corporation,
Defendant.

MEMORANDUM IN SUPPORT OF REQUEST FOR RULING PURSUANT TO RULE 56(d)

E. F. HUTTON CREDIT CORPORATION, a corporation,
Counterclaimant,
vs.
TELUM, INC., a Nebraska corporation, EARL COOK and CARL R. KING,
Counter-Defendants.

Case No. C83-0187J

* * * * * * * * *

Defendant/Counterclaimant E. F. Hutton Credit Corporation ("Hutton") respectfully submits to the Court the following memorandum in support of its request for a ruling pursuant to Rule 56(d) of the Federal Rules of Civil Procedure regarding matters as to which no substantial controversy exists.

* * *

UNRESOLVED ISSUES

I. WHETHER TELUM IS ENTITLED TO A JURY TRIAL

* * *

C. *The contractual waivers by the Telum bar a jury trial on any issues raised in the Counterclaim.*

Although plaintiffs did request a jury trial in their Reply to the Counterclaim, Telum, Cook and King have each contractually waived the right to jury trial on any issue related in any way to the Lease and the Guaranties. Such contractual waivers are fully enforceable and bar Telum from claiming the right to a jury trial on any issue herein. *McCarthy v. Wynne,* 126 F.2d 620 (10th Cir. 1942). The fact that the present litigation involves a challenge to the validity of the contracts which contain the waiver provision does not render those waivers unenforceable in this action. *Seligson v. Plum Tree, Inc.,* 361 F. Supp. 748 (E.D. Pa. 1973). Hutton has both the legal and contractual right to have this matter tried efficiently and expeditiously to the Court.

* * *

APPENDIX B

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IN THE

United States District Court

DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * * *

TELUM, INC., a Nebraska corporation,

Plaintiff,

vs.

E. F. HUTTON CREDIT CORPORATION, a corporation,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER

E. F. HUTTON CREDIT CORPORATION, a corporation,

Counterclaimant,

vs.

TELUM, INC., a Nebraska corporation, EARL COOK and CARL R. KING,

Counter-Defendants.

Case No. C83-0187J

* * * * * * * * *

E. F. Hutton Credit Corporation ("Hutton") submits the following Memorandum in Support of its Motion to Reconsider this Court's order denying its motion to strike the demand for jury trial:

INTRODUCTION

Hutton and Telum are the lessor and lessee, respectively, under a certain Master Lease Agreement with respect to an oil drilling rig. Earl K. Cook ("Cook") and Carl R. King ("King") are the guarantors of Telum's obligations under that lease. The present action began with the filing of Telum's complaint against Hutton for rescission of the lease, primarily on the grounds of fraud and misrepresentation in the inducement of the lease obligation. Specifically, Telum claims that IPCC, as Hutton was previously known, misrepresented that it had inspected the rig, that the rig was complete, and that the rig's description was accurate. Hutton counterclaimed against Telum seeking enforcement of the lease and recovery of payments due thereunder. Hutton also sought relief from Cook and King on their personal guaranties. In their Reply to the Counterclaim, the Counterdefendants, Telum, Cook and King, assert as defenses essentially the same facts alleged by Telum in its complaint.

The issue of the entitlement of Telum, Cook and King to a jury trial was determined by the Court at the Pre-trial Conference. Under the circumstances, most of the Court's attention was directed toward clarifying and limiting the theories advanced by Telum. Hutton did not have an opportunity to fully argue its position on the jury trial issue, and was therefore unable to effectively present the relevant applicable law to the Court at that time. By this memorandum, Hutton seeks to convince the Court that, because of their contractual waiver of any right to a jury trial in the lease and guaranty agreements, the Counterdefendants are not entitled to a jury trial on the relief sought in Hutton's Counterclaim. At most, they may be entitled to an initial jury determination of the limited issue of whether the jury

waiver provisions of their contracts were fraudulently induced.

Hutton recognizes that the opportunity to have a jury hear and resolve disputes in civil matters is generally considered to be an important right. However, under the circumstances of this case, Hutton's contractual right to have the issues set forth in its Counterclaim determined by the Court is equally important. In both the Complaint and the Reply to the Counterclaim, Telum has attempted to create a general confusion of the relevant issues. It has asserted a number of conflicting and contradictory theories in support of its position in this lawsuit and has refused to stipulate to any meaningful limitation of the facts or issues. Moreover, the Counter-defendants characterize Hutton as a large, impersonal corporate entity in conflict with a small, closely-held company and its individual shareholders. This strategy, combined with the nature of the allegations that have been made by Telum, creates a substantial likelihood of jury confusion and prejudice. On the other hand, the Court is in an unique position to cut through the confusion and to efficiently determine the remaining issues in this lawsuit. That fact is precisely why the parties are now so diametrically opposed on the jury trial issue, and is also why Hutton considers the issue significant enough to request that the Court reconsider its prior ruling.

ARGUMENT

DEFENDANTS' CONTRACTUAL WAIVERS OF A JURY TRIAL ARE FULLY ENFORCEABLE AND EFFECTIVELY PRECLUDE THEIR CLAIM FOR A JURY TRIAL IN THIS ACTION.

In paragraph 16(b) of the Master Lease Agreement, Telum waived "all right to trial by jury in any litigation arising herefrom or in relation hereto." Similarly, in the Guaranties, each of the Guarantors waived "trial by jury in any action or proceeding arising out of, under, on or by reason of this guaranty or any other dispute between Guarantor and IPCC."

It is well established that contractual agreements waiving a trial by jury are fully enforceable against the waiving party. The Tenth Circuit Court of Appeals has stated that such agreements are "neither illegal nor contrary to public policy," and that there is no reason why they should not be enforced. *McCarthy v. Wynne,* 126 F.2d 620, 623 (10th Cir.) *cert. denied,* 317 U.S. 640 (1942). In reaching the same conclusion, the Court in *Smith-Johnson Motor Corporation v. Hoffman Motors Corporation,* 411 F.Supp. 670 (E.D.Va. 1975), stressed the fact that the jury waiver agreement in that case was arrived at as a result of an arm's-length negotiation between experienced and sophisticated businessmen. The agreements in the present case were likewise the result of negotiation between sophisticated business entities, and as such are fully enforceable.

Moreover, jury wavier provisions are enforceable even in actions which challenge the validity of the underlying contracts. In *Seligson v. Plum Tree, Inc.,* 361 F. Supp. 748 E.D. Pa. 1973), the plaintiffs claimed that their franchise agreement with the defendants was violative of the antitrust laws. As such, plaintiffs argued, the jury waiver provision contained in that agreement was likewise invalid and unenforceable. However, the court rejected that argument as "specious," and granted the defendants' motion to strike the demand for a jury trial, stating that "the very issue is the validity of the contract and this is clearly covered by the waiver." 361 F. Supp. at 758.

Contractual jury waiver provisions are, in effect, a variation on contractual provisions specifying the forum in which disputes between the parties will be resolved. Such clauses are generally enforceable, even when the validity of the contract itself is in dispute. Thus, in *M/S Bremen v. Zapata Off-Shore Company,* 407 U.S. 1 (1972), the United States Supreme Court held that a contractual stipulation designating a particular forum for resolution of disputes, which had been negotiated at arm's length between sophisticated businessmen, was *prima facie* valid and would be enforced absent some compelling and countervailing reason not to do so. In order to avoid the application of such provision, the Court

held that the party challenging it must "clearly show that enforcement would be unreasonable or unjust, or that *the clause* was invalid for such reasons as fraud or overreaching." 407 U.S. at 15 (emphasis added). No such showing has been made or even proffered in this case.

Jury waiver provisions are also very similar in their consequences to contractual arbitration clauses, although the latter are a waiver of the judicial process entirely. The United States Supreme Court has enforced arbitration clauses despite allegations that the underlying contracts were invalid. Significantly, the arbitration clause cases draw a distinction between allegations of fraudulent inducement of the entire contract and fraudulent inducement of the arbitration clause itself. Thus, in *Prima Paint Corporation v. Flood & Conklin Manufacturing Company,* 388 U.S. 395 (1967), the Court held that a contractual arbitration clause in a contract was enforceable, despite the plaintiffs' allegation that the contract had been fraudulently induced. The Court found that the arbitration clause was "separable" from the contract, and therefore, would be enforced absent a specific allegation that the clause itself had been induced by fraud.

On the other hand, where the Court found an allegation of fraud to be directed specifically at the arbitration clause, it allowed the plaintiff an initial in-court determination of whether the arbitration clause was fraudulently induced. *See Mosely v. Electronic & Missile Facilities, Inc.,* 374 U.S. 167 (1963).

The parties in this case specifically agreed in paragraph 16 of the lease that the individual provisions of the lease are to be treated as severable and separately enforceable. Thus, like the arbitration clause involved in *Prima Paint,* the jury waiver provisions contained in the Master Lease Agreement and in the Guaranties should be treated as separable agreements which are presumptively valid and enforceable, absent proof of fraudulent inducement of the clauses themselves.

There have been no specific allegations of fraudulent inducement of the jury waiver clauses in the present case. The allegations of fraudulent inducement of the lease agree-

ment do not relate in any way to the jury waiver provision. In the absence of a more specific allegation, the jury waiver provision is valid and fully enforceable.

However, even if the pleadings are deemed sufficient to allow the Counterdefendants to pursue a theory of fraudulent inducement of the jury waiver provision, the Counterdefendants are only entitled to a jury trial on the limited issue of whether the jury waiver provisions themselves were fraudulently induced. If that issue is resolved in Hutton's favor, the Counterdefendants would not be entitled to a jury trial on any of the issues involving the enforceability of their contract obligations.

CONCLUSION

The presentation to a jury, in the manner apparently contemplated by Telum, of the kinds of allegations that have been made in this case could result in substantial confusion and would be prejudicial to Hutton. Such confusion and prejudice is not justified in light of the Counterdefendants' voluntary agreement to try the issues of this case before a court. On the basis of the foregoing authorities, the Counterdefendants' contractual waiver of their right to a jury trial should be enforced. At most, Counterdefendants should be entitled to a jury trial only on the specific issue of fraudulent inducement of the jury waiver provisions. Therefore, Hutton respectfully requests that this Court reconsider its previous ruling on this issue and strike the Counterdefendants' request for a jury trial.

DATED this 31 day of August, 1984.

FRANCIS M. WIKSTROM

FRANCIS M. WIKSTROM
of and for
PARSONS, BEHLE & LATIMER
Attorneys for E.F. Hutton Credit Corporation

APPENDIX C

MINUTES OF THE UNITED STATES DISTRICT COURT FOR DISTRICT OF UTAH

_X_ CENTRAL DIVISION _X_ CIVIL HEARING

___ NORTHERN DIVISION ___ CRIMINAL HEARING

DATE October 1, 1984

Case No. C83-187J TELUM, INC. vs HUTTON CREDIT CORP.

___ HON. ALDON J. ANDERSON ___HON. DAVID K. WINDER
_X_ HON. BRUCE S. JENKINS

Other: _____

Deputy Clerk Hana Shirata Reporter Ned Greenig

APPEARANCE OF COUNSEL

PLAINTIFF	DEFENDANT
Rex E. Madsen	**Francis M. Wikstrom**
Stephen Hill	

CALENDARED FOR: MOTION FOR RECONSIDERATION

Came on for hearing on defendant's motion for reconsideration. Arguments of counsel heard. Court denied the motion for reconsideration.

DEPUTY CLERK hs

APPENDIX D

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IN THE

United States District Court

DISTRICT OF UTAH, CENTRAL DIVISION

* * * * * * * * *

TELUM, INC., a Nebraska corporation, *Plaintiff,* *vs.* E. F. HUTTON CREDIT CORPORATION, a corporation, *Defendant.*	**MOTION *IN LIMINE* OF E. F. HUTTON CREDIT CORPORATION**
E. F. HUTTON CREDIT CORPORATION, a corporation, *Counterclaimant,* *vs.* TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING, *Counter-Defendants.*	**Civil No. C83-0187J**

* * * * * * * * *

E.F. Hutton Credit Corporation ("Hutton"), hereby moves the Court pursuant to the parol evidence rule for an order prohibiting Telum, Inc., Earl K. Cook and Carl R. King (collectively "Telum") from introducing any evidence regarding any alleged representation or promise by International Paper Credit Corporation or any of its agents or representatives ("IPCC"), prior to or contemporaneously with the execution of the subject lease, to the effect:

(1) That the oil rig which is the subject of the lease transaction at issue in this action would be warranted by IPCC to conform with the description incorporated in the lease documents;

(2) That IPCC would be responsible in any fashion for inspecting, appraising, or verifying the accuracy of the description of the subject oil rig; or

(3) That IPCC knew or would in any manner be responsible for determining or ensuring that the subject oil rig was, or would soon be, complete, in place, assembled or operational.

Such evidence would contradict the express terms of an integrated written agreement and would therefore violate the parol evidence rule.

Pursuant to the authority of *Universal Drilling Co. v. Camay Drilling Co.*, 737 F. 2d 869 (10th Cir. 1984), Hutton further requests a hearing *in camera* to determine whether Telum will be entitled to present any of the above-described evidence under any exception to the parol evidence rule.

In addition to the direct introduction of such inadmissible evidence, Hutton requests that the Court expressly prohibit Telum, either through counsel or otherwise, from making or eliciting, either directly or indirectly, any reference to any of the above-described matters, whether in *voir dire* examination, in opening and closing statements, in testimony from Witnesses, or in any other manner whatsoever.

This motion is supported by a Memorandum of Law filed concurrently herewith.

DATED this 19th day of February, 1985.

FRANCIS M. WIKSTROM

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APPENDIX E

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING, *Plaintiffs/Appellees,* *vs.* E. F. HUTTON CREDIT CORPORATION, a corporation, *Defendant/Appellant.*	**BRIEF OF APPELLANT** **Case No. 86-1375**

On Appeal from the United States District Court
District of Utah, Central Division

BRIEF OF APPELLANT

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IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

* * * * * * * *

TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING,

Plaintiffs/Appellees,

vs.

E. F. HUTTON CREDIT CORPORATION, a corporation,

Defendant/Appellant.

BRIEF OF APPELLANT

Case No. 86-1375

* * * * * * * * *

Chrysler Capital Corporation, formerly known as E.F. Hutton Credit Corporation ("Hutton"), Appellant in this action, submits the following Brief of Appellant pursuant to Rule 28 of the Federal Rules of Appellate Procedure. Pursuant to a stipulation of the parties which has been filed with the Court, Hutton is deemed the Appellant for purposes of this appeal.

STATEMENT OF THE CASE

This is an action brought by plaintiffs, Telum, Inc., and its principals, Earl K. Cook and Carl R. King, to rescind the finance lease of an oil drilling rig between Hutton and Telum and also to rescind the personal guaranties of Cook and King, on the grounds of fraud and failure of consideration. Hutton filed a counterclaim seeking to enforce the lease and guaranties.

Prior to trial, Hutton moved to strike plaintiffs' jury demand for the reason that plaintiffs had expressly waived

any right to a jury trial by the terms of the lease and guaranties. The trial court, however, refused to enforce those waivers.

After a two-week trial, the court submitted the case to the jury on special interrogatories. The jury found in favor of plaintiffs on the issues of fraudulent inducement and waiver. The court entered judgment rescinding the lease and the personal guaranties and denied Hutton's motion for a new trial or judgment notwithstanding the verdict.

STATEMENT OF ISSUES

* * *

4. Whether the District Court committed error in failing to enforce the jury waiver provisions of the agreements where there was no allegation or evidence that those jury waiver provisions were themselves fraudulently induced.

* * *

IV. THE DISTRICT COURT COMMITTED ERROR IN FAILING TO ENFORCE THE JURY WAIVER PROVISIONS OF THE PARTIES' AGREEMENTS IN THE ABSENCE OF ALLEGATIONS THAT THE JURY WAIVER PROVISIONS THEMSELVES WERE FRAUDULENTLY INDUCED.

In paragraph 16(b) of the lease, Telum waived "all right to trial by jury in any litigation arising herefrom or in relation hereto." (Exh. 1). Similarly, in the guaranties, each of the guarantors waived "trial by jury in any action or proceeding arising out of, under, on or by reason of this guaranty or any other dispute between Guarantor and [Hutton]." (Exh. 9, 10).

Telum's complaint, seeking rescission, was an action in equity in which no jury trial was available. Its only claim to a jury arose out of the counterclaim, which was based on the contract documents. The fact that some of the defenses raised by Telum involved the alleged voidability of the contracts does not alter the fact that Telum and its guarantors

expressly waived a jury trial in any action based on those contracts. If Telum's mere allegation that the contracts are voidable automatically negated the contractual jury waiver, such provisions would virtually always be unenforceable.

It is well established that contractual agreements waiving a trial by jury are fully enforceable against the waiving party. This Court has stated that such agreements are "neither illegal nor contrary to public policy," and that there is no reason why they should not be enforced, *McCarthy v. Wynne,* 126 F.2d 620, 623 (10th Cir.) *cert. denied,* 317 U.S. 640 (1942).

Moreover, jury waiver provisions are enforceable even in actions which challenge the validity of the underlying contracts. In *Seligson v. Plum Tree, Inc.,* 361 F.Supp. 746 (E.D.Pa. 1973), the plaintiffs claimed that their franchise agreement with the defendants violated the antitrust laws, and that the jury waiver provision contained in that agreement was therefore invalid and unenforceable. However, the court rejected that argument as "specious," and granted the defendants' motion to strike the demand for a jury trial, stating that "the very issue is the validity of the contract and this is clearly covered by the waiver." *Id.,* at 758.

Substantial support for Hutton's position comes from cases in which contractual arbitration clauses are enforced in the face of claims of fraudulent inducement. Contractual arbitration clauses are similar in their effect to jury waiver provisions, because the parties to an arbitration clause necessarily give up any right to a jury trial. However, an arbitration clause is considerably more drastic in that it represents, in essence, a waiver of the entire judicial process and denies the parties to the contract not only the right to a jury trial but also many other due process protections afforded by our system of courts.

Nonetheless, the United States Supreme Court has consistently enforced contractual arbitration clauses despite allegations that the underlying contracts were invalid. Significantly, the arbitration clause cases draw a distinction between allegations of fraudulent inducement of the entire contract and fraudulent inducement of the arbitration clause itself.

Thus, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the Supreme Court held that a contractual arbitration clause in a contract was enforceable, despite the plantiffs' allegation that the contract had been fraudulently induced. The Supreme Court found that the arbitration clause was "separable" from the contract, and therefore, would be enforced absent a specific allegation that the clause itself had been induced by fraud. In contrast, where there was an allegation of fraud directed specifically at the arbitration clause, the Supreme Court has allowed the plaintiff an initial in-court determination of whether the arbitration clause was fraudulently induced. *See Mosely v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963). If the more drastic waiver of the judicial process embodied in an arbitration clause is regularly enforced, the mere waiver of a right to jury trial should likewise be enforced where there has been no allegation or proof that the clause itself was induced by fraud.

Contractual jury waiver provisions are also, in effect, a variation on contractual provisions specifying the forum in which disputes between the parties will be resolved. Such clauses are generally enforceable, even when the validity of the contract itself is in dispute. Thus, in *M/S Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1972), the United States Supreme Court held that a contractual stipulation designating a particular forum for resolution of disputes was *prima facie* valid and would be enforced absent some compelling and countervailing reason not to do so. In order to avoid the application of such a provision, the Court held that the party challenging it must "clearly show that enforcement would be unreasonable or unjust, or that *the clause* was invalid for such reasons as fraud or overreaching." 407 U.S. at 15 (emphasis added). No such showing has been made or even proffered in this case.

The parties in this case specifically agreed in paragraph 16 of the lease that the individual provisions of the lease are to be treated as severable and separately enforceable. (Exh. 1). Thus, like the arbitration clause involved in *Prima Paint*, and like the choice of forum clause contained in *M/S Bremen*,

the jury waiver provisions contained in the lease and in the guaranties should be treated as separable agreements which are presumptively valid and enforceable.

* * *

APPENDIX F

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING, *Plaintiffs/Appellees and Cross-Appellants,* *vs.* E. F. HUTTON CREDIT CORPORATION, a corporation, *Defendant/Appellant.*	**Case No. 86-1375**

On Appeal from the United States District Court
District of Utah, Central Division

BRIEF OF APPELLEES AND CROSS-APPELLANTS

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IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

TELUM, INC., a Nebraska corporation, EARL K. COOK and CARL R. KING, *Plaintiffs/Appellees and Cross-Appellants,* *vs.* E. F. HUTTON CREDIT CORPORATION, a corporation, *Defendant/Appellant.*	**BRIEF OF APPELLEES AND CROSS-APPELLANTS** **Case No. 86-1375**

Appellees and cross-appellants, Telum, Inc., Earl K. Cook and Carl R. King, submit the following brief pursuant to Rule 28 of the Federal Rules of Appellate Procedure:

STATEMENT OF THE CASE

Telum, Inc. ("Telum") brought this action to rescind the lease of an oil drilling rig from E. F. Hutton Credit Corporation ("Hutton") to Telum and also to rescind the personal guarantees of Telum's owners, Carl King and Earl Cook, on the grounds of fraud, breach of contract, failure of consideration, negligent misrepresentation, mutual mistake, unilateral mistake, and constructive fraud. Telum also sought special damages as a result of the fraud committed by Hutton. Hutton counterclaimed seeking to enforce the lease and guaranties.

Following a two-week trial, the jury returned a verdict in favor of Telum, finding that Hutton had fraudulently induced Telum to enter into the lease and that Telum did not know of the fraud committed by Hutton at the time it

signed a subsequent agreement for a three-month extension of lease payments. Based on the jury's verdict, the trial court (1) entered judgment rescinding the lease and the personal guaranties and (2) dismissed Hutton's counterclaim. The trial court also denied Hutton's motion for judgment notwithstanding the verdict.

STATEMENT OF ISSUES

* * *

4. Whether the trial court properly submitted Telum's defenses of fraud and breach of contract to the jury.

* * *

IV. THE TRIAL COURT PROPERLY GRANTED PLAINTIFF TRIAL BY JURY.

Telum's claim of right to trial by jury arose out of Hutton's counterclaim, which was based on the lease and guaranties. Telum asserted various affirmative defenses to the counterclaim, including fraud.

The Seventh Amendment right to trial by jury is fundamental and can only be relinquished knowingly and intentionally. *Johnson v. Zerbst,* 304 U.S. 458 (1938). The courts will indulge every reasonable presumption against waiver. *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393 (1936). Courts, for example, have refused to enforce jury waiver clauses buried in printed forms absent a showing that such clauses were specifically bargained for. *National Equipment Rental, Inc. v. Hendrix,* 565 F.2d 255, 258 (2nd Cir. 1977) (the court refused to enforce jury waiver clauses "set deeply and inconspicuously" in two equipment lease agreements); *Dreiling v. Peugot Motors of America, Inc.,* 539 F. Supp. 402, 403 (D. Colo. 1982) (the court refused to enforce a jury waiver clause, stating that a "constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly by mere insertion of a waiver provision on the twentieth page of a twenty-two page standardized form contract"). In *Gardner & North Roofing & Siding Corp. v.*

Champagne, 265 N.Y.S.2d 707, 48 Misc. 2d 716 (1965), the court observed:

> It is settled law that parties may by contract and agreement waive trial by jury regarding future litigation between the parties. However, trial by jury in civil cases is an important right guaranteed by the New York Constitution and cannot be waived unless the intention of the parties is clearly expressed in light of all the circumstances. Such a waiver, being in derogation of constitutional rights, must be strictly and precisely construed against one who submits such an instrument. *The instant writing containing a clause waiving a jury trial buried in the twenty-fifth line of forty lines of small print, single-spaced, unparagraphed, in a case where fraud is alleged in the answer, can hardly be claimed to be an intentional abandonment of a known right or advantage to trial by jury.* [Emphasis added.]

The jury waivers upon which Hutton relies in the present case are in small print, single-spaced, and unparagraphed, and fraud was alleged in reply to the counterclaim. In addition, Hutton insisted that the lease be documented with its standard printed forms. Tr. 528, 1113. Accordingly, there is no evidence that the waivers were bargained for or that Telum knowingly and intentionally waived its right to trial by jury.

Even in cases where a waiver may exist, the Tenth Circuit has repeatedly held that the trial court has broad discretion in determining whether a jury trial should be granted. Under such circumstances, the trial court's decision to grant or deny trial by jury is not to be reversed unless it appears under all the facts and circumstances that the court abused its discretion. *Paramount Pictures Corp. v. Thompson Theatres, Inc.,* 621 F.2d 1088, 1090 (10th Cir. 1980); *United States Fidelity and Guaranty Co. v. Lembke,* 328 F.2d 569, 573 (10th Cir. 1964); *Hazelrigg v. American Fidelity & Casualty Co.,* 241 F.2d 871 (10th Cir. 1957).

The trial court in the present case certainly did not abuse its discretion, but rather acted with utmost care. The general

rule is that where a contract is induced by fraud, the entire contract is voidable. *E.g., President and Directors of Manhattan Co. v. Monogram Associates, Inc.*, 92 N.Y.S.2d 579, 580 (N.Y. Sup. Ct. 1949); *First Acceptance Corp. v. Kennedy*, 95 F. Supp. 861, 878 (D. Iowa 1951). Under this general rule, the jury waiver clauses in the present case could not be enforced because the contract documents containing them were fraudulently induced. In addition, before the trial court would allow the jury to hear any testimony of fraud, it previewed that testimony to determine whether it was sufficient to go to the jury. Tr. 71-152. Only after making its own determination that there was sufficient evidence of fraud did the court permit the jury to hear that evidence. Tr. 152-198.

The jury ultimately found the contract documents to have been fraudulently induced. The court thereafter made its own finding that Telum was entitled to recission of the contract documents based on Hutton's fraud. Under the circumstances, it cannot be concluded that the court abused its discretion in submitting Telum's defense of fraud to the jury.

* * *

APPENDIX G

Rule 28.1 Listing Of Affiliates

Chrysler Automotive Operations, Inc.
- Chrysler Motors Corporation
  - Acustar, Inc.
    - Acustar Canada Inc.
    - Acustar Holdings, Inc.
    - Auto Electronica de Juarez S.A. de C.V.
    - Chrysler Marine Corporation
    - Chrysler Plastic Products Corporation
    - Coleman Products Company
      - Circuitos Mexicanos de Nogales S.A. de C.V.
    - Ensambles de Interiores Automotrices, S.A. de C.V.
    - Evart Products Company
    - MacDonald Molding, Inc.
    - Mercury Plastics Company
    - Productos Electricos Diversificados, S.A. de C.V.
    - Rantoul Products, Inc.
    - Trenton Chemical Inc.
  - Automotive Finanical Services, Inc.
  - Chrysler Canada Ltd.
    - Chrysler Leasing Ltd.
    - Chrysler Service Contract Company Inc,
    - Commuter Van Pooling Services Ltd.
    - DCI Diesel Canada Inc.
    - 32 Marketing Investment Division Corporations
  - Chrysler Export Corporation
  - Chrysler Foreign Sales Corporation
  - Chrysler Institute of Engineering
  - Chrysler International Corporation
    - Automobili Lamborghini S.p.A.
      - Lamborghini Engineering S.p.A.
    - Chrysler Automotive Services GmbH
    - Chrysler China Services, Inc.
    - Chrysler Italian Imports, Inc.

Chrysler Korea, Inc.
Micoperan Holding B.V.
Chrysler International S.A.
CISA Financial Services S.A.
Chrysler International Services S.A.
CISSA do Brasil Limitada
Chrysler Learning, Inc.
Automotive Education Centers, Inc.
Chrysler Learning Management Corporation
Chrysler de Mexico S.A.
Aire y Temperatura S.A.
Chrysler Overseas Trading Co. Ltd.
Chrysler San Juan, Inc.
Chrysler Service Contract Company
Chrysler Transport, Inc.
Chrysler de Venezuela S.A.
Rootes Motors de Venezuela S.A.
The F M Group, Inc.
Jeep Eagle Corporation
AMC-Tech, Inc.
AMC de Venezuela, C.A.
American Motors International Sales Corporation
American Motors International Trading Corporation
American Motors Leasing Corporation
AMC Leasing Corporation
American Motors Overseas Corporation
American Motors Pan American Corporation
B D Realty, Inc.
Graphic Center, Inc.
Jeep Eagle Sales Corporation
20 Marketing Investment Division Corporations
Jeep Africa, Ltd.
Jeep Australia, Pty., Ltd.
Jeep of Canada Limited
Jeep International Corporation
Jeep Japan, Ltd.

Jeep Motorsports, Inc.
Jeep de Venezuela, S.A.
Cayman Island Investment Co.
A.R.S. Financing, Inc.
A.R.S. Global Services, Inc.
Jeep Caracas, S.A.
MSC, Inc.
WPD, Inc.
NuCar Prep System, Inc.
Pentagroup, Inc.
Pentastar Travel Services, Inc.
Scrib Incorporated
Secorp, Inc.
VPSI, Inc.
51 Marketing Investment Division Corporations
Chrysler Corporation Fund
Chrysler Financial Corporation
Chrysler Auto Receivables Company
Chrysler Capital Corporation
Advanced Leasing Services Number 3, Inc.
Artesia Turbine Cogeneration Corporation
Chrysler Asset Management Corporation
Chrysler Systems Leasing Inc.
CSL Technical Services Inc.
Marine Asset Management Corporation
Trico Marine Operators, Inc., a Louisiana corporation
Chrysler Capital Funding Corporation
Chrysler Capital Investment Services, Inc.
Chrysler Capital Offshore Corporation
Chrysler Capital Public Finance Corporation
Chrysler Capital Realty II, Inc.
Chrysler Capital Transportation Services, Inc.
Chrysler Natural Resources Development Corporation
Chrysler Rail Transportation Corporation
Conemaugh Hydroelectric Projects, Inc.
FPB California Congeneration Corporation
Fresno Biomass Power Corporation

Interconnect I Corporation
Interconnect II Corporation
Jasmin EOR Cogeneration Corporation
LC Leasing, Inc.
O-I Investors, Inc.
Ormesageo IE Corporation
Star Group IE
Geothermal Partners, a California corporation
Poso EOR Cogeneration Corporation
Rocklin Biomass Power Corporation
Salinas Turbine Cogeneration Corporation
Stillwater Geothermal Corporation
Star Group
Stillwater Geothermal Partners, a Nevada corporation
Suffolk Leasing, Inc.
Trona Cogeneration Corporation
TTC Corporation
Whitefield Biomass Energy Corporation
Chrysler Capital Realty, Inc.
Chrysler Bethel Corporation
Chrysler Biscayne Corporation
Chrysler Credit Realvest Inc.
CFC/GECC (New York) Associates I
Chrysler Meridian Corporation
Clinton Holding Corporation
RAE Hotel Corporation
Chrysler Medowcroft Corporation
Chrysler Timberlake Corporation
Chrysler Commercial, S.A. de C.V.
Chrysler Commercial Leasing Corporation
Chrysler Cadre Inc.
Eagle Associates, a New York partnership
Chrysler Consortium Corporation
Pinnacle Partners, a Connecticut partnership
Chrysler Credit Canada Ltd.
Chrysler Credit Holdings Ltd.

Chrysler Finance Limited
Chrysler First Diversified Credit Ltd.
Ariens Credit Ltd.
Mercury Marine Acceptance Ltd.
Sea Ray Credit Ltd.
Snapper Financial Services Corporation Ltd.
Chrysler Life Insurance Company of Canada
Chrysler Credit Corporation
Chrysler Credit de Puerto Rico N.V.
Chrysler Financial Overseas Capital N.V.
Chrysler First Inc.
AIA, Inc. of Pennsylvania
Allentown General Corporation
Chrysler First American Financial Services Corporation
Chrysler First Business Credit Corporation
Chrysler First Consumer Discount Company
Chrysler First Diversified Credit Inc.
Ariens Credit Corporation
Calkins Diversified Credit Inc.
Carver Creditcorp Inc.
Champion Credit Corporation
CompAir Kellogg Credit Corporation
Donzi Credit Corporation
Godfrey Acceptance Corporation
Hupp Credit Corporation
Komatsu Forklift Credit Corporation
Korg Acceptance Corporation
Mercury Marine Acceptance Corporation
Music America Finance Corporation
Promark Credit Corporation
Roth Financial Services Corporation
Sea Ray Credit Corporation
Snapper Financial Services Corporation
Chrysler First Financial Services Corporation (Delaware)
Chrysler First Financial Services Corporation of America (Delaware)

Chrysler First Financial Services Corporation of America (Florida)
Chrysler First Financial Services Corporation of America (Iowa)
Chrysler First Financial Services Corporation of America (Minnesota)
Chrysler First Industrial Loan Company
Chrysler First Information Technologies Inc.
Chrysler First Monetary Corporation
Chrysler First Thrift Company (California)
Chrysler First Wholesale Credit Inc.
Chrysler Insurance Company
Chrysler Life Insurance Company
Chrysler Life Insurance Company of Arizona
Chrysler Leasing Corporation
Chrysler Realty Corporation
ABKO Properties Management Corporation
AMC Properties Corporation
EFH Leasing Corporation
1981 Helicopters Ltd.
1044652 Canada Ltd.
Redisco Canada Ltd.
Chrysler Pentastar Aviation, Inc.
Chrysler Technologies Corporation
Electrospace Systems, Inc.
Pentastar Electronics, Inc.
Pentastar Support Services, Inc.
Telephone Industries, Inc.
Gulfstream Aerospace Corporation (Del.)
Gulf Aero Insurance Company Limited
Gulfstream Aerospace Corporation (GA)
GAC International Corporation
Gulfstream Aerospace Export Corporation
Gulfstream Aerospace F.S.C. Ltd.
Gulfstream Aerospace International Corporation
Gulfstream Aerospace Corporation (OK)
Gulfstream Aerospace Corporation of Texas

Interiores Aeros S.A. de C.V.
7701 Woodley Avenue Corp.

Additional Affiliated Companies:

Arab American Vehicles Company
Automation Technologies Products
Beijing Jeep Corporation, Ltd.
CFC/CECC (New York)
Chrysler Japan Sales Limited
Diamond-Star Motors Corporation
Ensambladora Carabobo, C.A.
F. F. Developments Limited
Genigraphics Corporation
Mahindra & Mahindra, Ltd.
Manufacturers Hanover Asia, Limited
Mitsubishi Motors Corporation
Officine Alfieri Maserti S.p.A.
Onset Bidco, Inc.
Rambler Motors (AMC) Limited
Synektron Corporation
Valeo/Acustar Thermal